

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT NICHOLAS CORPUZ,

Defendant and Appellant.

F041563

(Super. Ct. No. SC084193A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Robert T. Baca, Judge. (Retired judge of the Kern Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Oliver J. Northup, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, J. Robert Jibson and Judy Kaida, Deputy Attorneys General, for Plaintiff and Respondent.

Robert Corpuz appeals his July 2002 jury conviction for stalking in violation of a court order, a felony (Pen. Code, § 646.9, subd. (b))¹ and violating a protective order, a misdemeanor (§ 273.6, subd. (a)).² The trial court sentenced appellant to the middle term of three years for the section 646.9 felony conviction, and a concurrent 180-day sentence on the misdemeanor count. He timely appeals, contending that his convictions must be reversed because the probationary “stay away” order the convictions were based on does not fall within the meaning of either of the Penal Code sections under which he was convicted. In this opinion, we hold that appellant’s conviction under section 646.9, subdivision (b) cannot be based on his violation of a condition of probation. We also agree that he was improperly convicted of violating a protective order. Accordingly, we reduce appellant’s conviction under section 646.9, subdivision (b) to the lesser included offense found in subdivision (a), vacate the misdemeanor sentence under section 273.6, and remand for resentencing.

FACTS

Appellant has a young child with his ex-girlfriend, Evelia (Evie) Chavez. In April of 2001, appellant was arrested for pushing and hitting Chavez, and ultimately pled no contest to a violation of section 243, spousal battery. Appellant received three years’ probation with a condition that he stay away from Chavez during the probation period (“Defendant ordered to stay away from Evie Chavez during probationary period”). Chavez and appellant thereafter resumed their relationship until they stopped dating again in March of 2002. Thereafter, appellant approached Chavez at her place of employment at least three times, one time pulling on her shirt. At approximately 11:30 p.m. on April 25, 2002, appellant threatened Chavez on her cellular phone and left numerous messages

¹ Further statutory references are to the Penal Code except as otherwise noted.

² Appellant was found not guilty of making threats in violation of section 422.

on her voice mail. When Chavez drove home that night, appellant was waiting for her and repeatedly kicked and punched her car and tried to open her locked door. Chavez called 911, and appellant was arrested.³

DISCUSSION

Appellant's primary claim is that his conviction for stalking in violation of a court order must be reversed because his violation of the stay away condition of probation does not fall within the meaning of section 646.9, subdivision (b) (hereafter subdivision (b)).

Section 646.9, subdivision (a) provides:

“Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking, punishable by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.”

Subdivision (b) then provides:

“Any person who violates subdivision (a) when there is a temporary restraining order, injunction, *or any other court order* in effect prohibiting the behavior described in subdivision (a) against the same party, shall be punished by imprisonment in the state prison for two, three, or four years.” (§ 646.9, subd. (b), italics added.)

Thus, a violation of subdivision (a) is punishable as either a felony or a misdemeanor (a “wobbler”), while a violation of a subdivision (b) is a straight felony. Appellant contends he did not violate subdivision (b) because a condition of probation is not the kind of court order covered by the statute. At least one other court has, in dicta, assumed this to be the case. (See *People v. McClelland* (1996) 42 Cal.App.4th 144, 152 [“subdivision (b) serves the manifest legislative purpose of providing enhanced punishment to those

³ The voice mail messages and Chavez's call to 911 were played for the jury.

stalkers *who have been ordered to refrain from such conduct in civil proceedings*, and, hence, have been warned that their behavior is unacceptable.” (Italics added).] We reject appellant’s reasoning, but agree with his conclusion that “stay away” probation conditions do not fall within subdivision (b).⁴

Statutory Language

When interpreting a statute, our primary purpose is to determine the Legislature’s intent in enacting the statute. “In doing so we turn first to the statutory language, since the words the Legislature chose are the best indicators of its intent.” (*Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 826.) When examining the words the Legislature used, we are to give ““effect to the usual, ordinary import of the language, at the same time not rendering any language mere surplusage.”” (*Klajic v. Castaic Lake Water Agency* (2001) 90 Cal.App.4th 987, 997.) We must also keep in mind that, “any statutory ambiguities in a penal law ordinarily should be construed in the defendant’s favor.” (*People v. Franklin* (1999) 20 Cal.4th 249, 255.) “When language which is susceptible of two constructions is used in a penal law, the policy of this state is to construe the statute as favorably to the defendant as its language and the circumstance of its application reasonably permit. The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or

⁴ Relying on *People v. Johnson* (1993) 20 Cal.App.4th 106 (*Johnson*), appellant primarily argues that the reason probationary and parole orders do not fall within subdivision (b) is because they are not punishable by contempt. *Johnson* held, in an adult probation revocation context, that “a trial court cannot punish conduct which amounts to a violation of a condition of probation as a contempt of court.” (*Johnson, supra*, 20 Cal.App.4th at p. 113.) Appellant extrapolates this holding to conclude that because the consequence for a violation of probation is already governed by section 1203, the statute governing violations of probation, the stay-away condition of his probation is not a “court order.” His argument misses the mark. Whether a probation condition is punishable by contempt as a “court order” does not answer the question of whether such orders – which are undoubtedly “court orders” – fall within the language and purpose of subdivision (b).

the construction of a statute.” (*People v. Overstreet* (1986) 42 Cal.3d 891, 896.) In this case, appellant argues that the phrase “any other court order” in subdivision (b) was not intended to include stay away conditions of probation. For the reasons set forth below, we agree.

Applicable Rules of Statutory Construction

A person violates subdivision (b) by committing harassing conduct as set forth in subdivision (a) when, at the time the harassing conduct occurs, “there is a temporary restraining order, injunction or any other court order in effect prohibiting the behavior described in subdivision (a) against the same party” When giving meaning to the words “any other court order” we cannot analyze them in isolation, but must consider that they follow two very specific types of orders: temporary restraining orders and injunctions. Particular expressions qualify those which are general. (Civ. Code, § 3534.) Thus, under the *ejusdem generis* canon of statutory construction, where general words follow the enumeration of particular classes of things we are to construe the general words as applying only to things of the same general class as those enumerated. (*Campbell v. Board of Dental Examiners* (1975) 53 Cal.App.3d 283, overruled on other grounds in *California Teachers Assn. v. San Diego Comm.* (1981) 28 Cal.3d 692.) The rule *ejusdem generis* is particularly applicable to penal statutes. (*People v. McKean* (1925) 76 Cal.App. 114; *People v. Wolff* (1964) 61 Cal.2d 795, 821 [““In construing criminal statutes the *ejusdem generis* rule of construction is applied with stringency””].) Thus, the phrase “any other court order” must be viewed in the context of following the specific types of orders listed before it. As constructed, the statutory language must be read to mean any other court order *that is like a* temporary restraining order or injunction, such as other orders that specifically prohibit harassing behavior and put the person being restrained on notice that the harassing behavior is prohibited.

This reading of the statute also satisfies the basic rule of statutory construction that we are not to read a statute so as to render any part of it surplusage. (*People v. Cruz*

(1996) 13 Cal.4th 764, 782; *Woosley v. State of California* (1992) 3 Cal.4th 758, 775-776.) Here, were we to interpret “any other court order” to quite literally mean *any* court order that prohibited the type of conduct described in subdivision (a) it would render the words “temporary restraining order” and “injunction” meaningless. Had the Legislature intended to use subdivision (b) to punish for harassing behavior that occurred when there was any type of court order “in effect prohibiting the behavior described in subdivision (a),” it should have omitted the words “temporary restraining order” and “injunction.” Because it did not do so, we are led to conclude the additional words have some meaning; that is, to illustrate the kinds of orders that will fall under subdivision (b).

Stay Away Conditions of Probation are Not Sufficiently “Like” TROs or Injunctions to Come Within Subdivision (b)

The foregoing analysis of course begs the question: is a stay away condition of probation a court order sufficiently “like” a restraining order or injunction so as to fall within subdivision (b)?

First, we look to the statute itself. Subdivision (c) provides:

“(c)(1) Every person who, after having been convicted of a felony under Section 273.5 [corporal injury to a spouse], 273.6 [violation of a court order to prevent harassment], or 422 [criminal threats], commits a violation of subdivision (a) shall be punished by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment, or by imprisonment in the state prison for two, three, or five years.”

Subdivision (c)(2) then proscribes identical punishment for repeat violations of subdivision (a). Thus, the statute specifically provides for the type of prior criminal behavior that will implicate greater punishment if the defendant subsequently stalks. Battery is not one of those enumerated crimes. That other prior domestic violence related criminal behavior is specifically enumerated in subdivisions (c)(1) and (c)(2) lends support to the conclusion that subdivision (b) was only intended to apply to temporary restraining orders, protective orders, and other *civil-type* court orders prohibiting the

defendant from engaging in stalking type activity as defined in subdivision (a), since repeated criminal harassing behavior is already covered in subdivision (c).⁵

Legislative History

Nevertheless, we recognize that the general rules of construction applied above are simply that – general rules – and may not defeat legislative intent. (*Coleman v. City of Oakland* (1930) 110 Cal.App. 715.) The People urge that the legislative history of section 646.9 indicates a legislative desire to include conditions of probation or parole within subdivision (b). Our review of the legislative history is not so conclusive.

As pointed out by the People, the Legislative Counsel’s Digest indicates prior versions of the bill were to provide for the increased penalties “with respect to a person *granted probation or released on parole* upon the condition that they are prohibited from the behavior described in (1) [subdivision (a)] against the same party” After revision, the specific “probation” or “parole” conditions disappeared and the “any other court order” language was ultimately inserted to subdivision (b). (Legis. Counsel’s Dig., Sen. Bill No. 1342(3), Jan. 29, 1992, as amended April 21, 1992.)

This change to the language is itself ambiguous. On the one hand, such a change can indicate a legislative desire *not* to include conditions of probation or parole since they

⁵ Appellant also argues that the legislative use of the word “party” in subdivision (b) to describe the victim of the harassing conduct supports the conclusion that the only civil-type orders fall under subdivision (b). He contends that, in the criminal context, the harassing conduct that would be prohibited with respect to the violation of a condition of probation or parole would be against the *victim* of the prior crime, not a “party.” What the statute actually says is that a person has violated subdivision (b) if they violate subdivision (a) while there is “any other court order in effect prohibiting the behavior described in subdivision (a) against the same party.” It is unclear from this language whether “party” refers to the defendant or the victim. Use of the word “against” would seem to indicate it is referring to the defendant, while it could also be describing the behavior that is prohibited “against” the victim. At best, we find the language ambiguous.

were expressly considered and apparently rejected. On the other hand, as the People urge, the legislative change making the wording *more inclusive*, i.e., from the specific (conditions of probation or parole) to the more general (any court order), evidences an intent to include conditions of probation or parole within the broader wording “any other court order.” Generally, we would agree with the People that the more general language would include the more specific wording it replaced. (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 18 [where specific language is replaced by general language courts cannot infer an intent to exclude the specific].) However, it is not clear from the history whether “any other court order” actually replaced the prior draft language including conditions of probation or parole, or whether it was simply an unrelated addition to subdivision (b).

Moreover, analysts’ memoranda included with the legislative history of SB1342, the bill that amended section 646.9 in 1992, indicate the purpose behind including a subdivision regarding probation or parole was to cover those defendants who were on probation or parole *for stalking*. (Senate Judiciary Committee, Memorandum, SB 1342, 5-5957, April 29, 1992 amendments.) Since the statute would already cover such violations with a repeat offender provision (now subdivision (c)(2)),⁶ the provision regarding probation or parole was apparently dropped as redundant. It is not clear from the legislative history when or for what purpose the “any other court order” language was added, unless it was an attempt to include violations of probation or parole from *misdemeanor* convictions under subdivision (a), but that would not apply in this case and, in any event, we certainly cannot speculate that meaning into the statute.

⁶ Subdivision (c)(2) provides, “Every person who, after having been convicted of a felony under subdivision (a), commits a violation of this section shall be punished by imprisonment in the state prison for two, three or five years.”

What *is* found throughout the legislative history, however, is evidence that the goal of the Legislature was to punish harassing conduct and *repeated* harassing conduct. There are numerous references throughout the history to “repeated stalking” and the danger that stalkers create for society. (Sen. Bill No. 1342, April 29, 1992 Leg. Session 5/5/92 Senate Floor Analyses [“The purpose of this bill is to increase the penalties for repeated stalking”]; see also subdivision (c)(2) “Every person who, after having been convicted of a felony under subdivision (a), commits a violation of this section shall be punished by imprisonment in the state prison for two, three or five years”].) This legislative purpose would be furthered by more severely punishing stalking behavior that follows issuance of a restraining-type order prohibiting stalking, as opposed to more general probation conditions that follow non-stalking criminal behavior, such as battery.

Moreover, principles of construction and legislative history aside, the order in place here illustrates the problem with trying to fit conditions of probation and parole into this statutory framework at all: appellant was ordered simply to “stay away” from Chavez. Such an order protects Chavez from the behavior appellant engaged in to get convicted under section 243: that is, being battered by appellant. It does not necessarily prohibit appellant from calling, e-mailing or otherwise engaging in conduct that might constitute a violation of subdivision (a). Thus, the order in place against appellant ordered him to stay away from Chavez but did not necessarily order him to not engage in *all* of the behavior described in subdivision (a), and thus, by its terms, does not clearly fall under the language of subdivision (b).⁷ Further, a condition of probation such as a stay away order does not provide notice and opportunity for a contested hearing for the

⁷ In this case, appellant’s behavior did violate both subdivision (a) and his probationary stay away order as part of his harassing conduct included coming to Chavez’s workplace and hitting and kicking her car.

person restrained to dispute the provisions of the order. Nor does it necessarily provide explicit notice of the prohibited behavior like a temporary restraining order or criminal protective order does.⁸ Accordingly, the apparent legislative goal of more severely punishing repeat stalking behavior for those who are “on notice” that their behavior is unacceptable is not necessarily fulfilled by automatically including stay away conditions of probation under subdivision (b).

We recognize the somewhat anomalous results the statute as written can create. Under this statute, prior criminal conduct – in fact *felony* criminal conduct – when followed by the behavior described by subdivision (a) can result in misdemeanor charges. (§ 646.9, subd. (c)(1).) However, someone who violates subdivision (b) after merely having a civil restraining order against them will face a mandatory felony sentence. While we might question the wisdom of such a sentencing scheme, it is consistent with the apparent overall intent of the statute: to more severely punish repeated *harassing*

⁸ The Judicial Council form restraining order provides, for example, that the restrained person must not “harass, attack, strike, threaten, assault (sexually or otherwise), hit, follow, stalk, molest, destroy personal property, disturb the peace, keep under surveillance, or block movements” (Judicial Council Form DV-110, Matthew Bender 4/04, DV-110, Page 2 of 5.) A protective order in a criminal proceeding warns the defendant not to “annoy, harass, strike, threaten, sexually assault, batter, stalk, destroy personal property of, or otherwise disturb the peace of the protected persons” (Judicial Council Form CR 160, “Protective Order in Criminal Proceeding (CLETS),” Thomson West, Revised January 1, 2003.) In our opinion, this type of criminal protective order would fall within subdivision (b).

This is not to say that to be convicted under subdivision (b) the prior court order must mirror the prohibiting language of subdivision (a) exactly; it simply further supports interpreting the statute to exclude conditions of probation as falling within “orders” described by subdivision (b). (See *People v. McClelland*, *supra*, 42 Cal.App.4th at p. 152 [“it is not the language of subdivision (a) and the language of the restraining order which must be harmonized, it is that defendant's *behavior* must have violated both subdivision (a) and the order”])

conduct, not merely to punish harassing conduct that occurs following some other type of criminal behavior (such as here, an earlier battery). To the extent the language and intent behind subdivision (b) are ambiguous, we are compelled to resolve those ambiguities in favor of the defendant. (*People v. Overstreet, supra*, 42 Cal.3d at p. 896.) To the extent a sentencing incongruity exists in the statute as written, it is for the Legislature to resolve.

In sum, we hold that a stay away condition of probation does not fall within the “any other court order” language of section 646.9 subdivision (b).⁹ Nevertheless, the evidence here clearly established appellant’s guilt with respect to the elements of stalking in subdivision (a), and he does not claim otherwise. Regardless of our conclusion regarding “other court order,” under the express provision of subdivision (b), the defendant cannot be found guilty of a violation of subdivision (b) unless he or she is in violation of subdivision (a). Therefore, as appellant’s counsel conceded at oral argument, subdivision (a) is a necessarily lesser included offense of subdivision (b). Accordingly, we reduce appellant’s conviction under subdivision (b) to that of a violation of the necessarily lesser included offense of subdivision (a), and remand for resentencing under that subdivision.¹⁰ (See *People v. Lopez* (1998) 19 Cal.4th 282, 288; *People v. Smith*

⁹ We do not decide whether a condition of probation could *ever* be sufficiently “like” an injunction or restraining order to fall within the meaning of the statute, but question the likelihood of that occurrence since such an order would probably be crafted following a conviction for a crime already otherwise covered by subdivision (c).

¹⁰ We recognize that at least one court has held – in the context of resolving a double jeopardy question not at issue here – that subdivision (b) constitutes a penalty enhancement to subdivision (a) and is not a substantive crime in and of itself. (See *People v. Kelley* (1997) 52 Cal.App.4th 568, 576, fn. omitted [“The provisions relating to the violation of a restraining order do not define a crime They merely create a punishment enhancement.”].) The *Kelley* court, however, was called on to determine whether jeopardy would attach with respect to a subdivision (b) prosecution after the defendant had already been convicted of violating the civil restraining order that resulted in the subdivision (b) charge. The court held that it would not, because it found the

(1984) 155 Cal.App.3d 1103, 1188, disapproved on other grounds in *Baluyut v. Superior Court* (1996) 12 Cal.4th 826.)

Misdemeanor Violation of a Protective Order Conviction

Appellant next maintains that his misdemeanor conviction for violation of section 273.6 (violation of protective order) must be vacated because the stay-away order does not constitute a protective order and is thus unsupported by the evidence. Section 273.6, subdivision (a), by its terms, applies only to the protective orders set forth therein. The section states:

“Any intentional and knowing violation *of a protective order, as defined in Section 6218 of the Family Code, or of an order issued pursuant to Section 527.6 or 527.8 of the Code of Civil Procedure, or Section 15657.03 of the Welfare and Institutions Code*, is a misdemeanor punishable by a fine of not more than one thousand dollars (\$1,000), or by imprisonment in a county jail for not more than one year, or by both that fine and imprisonment.” (§ 273.6, subd. (a), italics added.)

The People concede that the stay-away order does not constitute a protective order such that appellant could be prosecuted under section 273.6. “Protective order” is a term of art defined within section 273.6. A cursory review of the statutes listed therein makes clear a probationary stay-away order is not included. We will direct the trial court to vacate appellant’s misdemeanor conviction under section 273.6.

“substantive” portion of the offense charged to be subdivision (a), not subdivision (b). We need not address whether we agree with that determination, as the procedural posture of the case before us is vastly different from that before the *Kelley* court, and thus the *Kelley* analysis is simply inapplicable here. For our purposes, it is sufficient that subdivision (b) cannot, by its terms, be violated without a violation of subdivision (a), making it a necessarily included offense. (*People v. Lopez, supra*, 19 Cal.4th at p. 288.)

DISPOSITION

The conviction of section 646.9(b) is reduced to a judgment of conviction of section 646.9(a) and remanded for resentencing consistent with that subdivision. The misdemeanor conviction under section 273.6 is reversed.

Ardaiz, P.J.

WE CONCUR:

Cornell, J.

Dawson, J.